WONG HENG FATT v. PUBLIC PROSECUTOR

[A.Cr.J. (Smith J.) August 4, 1958]

[K.L. — Selangor Criminal Appeal No. 23 of 1958]

Criminal Law and Procedure — Statement by accused person from the dock — Whether evidence within s.174(ii) of the Criminal Procedure Code (Cap.6) — Whether accused entitled to make submission — Filing affidavit with petition of appeal.

Penal Code s.411 — Dishonestly retaining stolen property.

This was an appeal against conviction on a charge of dishonestly retaining stolen property. The evidence led was to the effect that the appellant received from the thief a box of 100 nozzles which had been stolen from Messrs. Wearne Bros. Ltd.; the thief gave evidence that he gave them to the appellant; the appellant led the police inspector to a room and handed to him a box of nozzles. These facts, counsel for the appellant submitted, did not constitute a *prima facie* case in that the evidence of the thief was uncorroborated. In his grounds of judgment the learned President made no reference to his relying in any way on the evidence of the accomplice but appeared to have relied on the fact that the appellant was in possession of the goods which had been recently stolen. The evidence given by the employees of Wearne Bros. showed that the nozzles did not leave the workshops in the normal manner. The appellant, who was represented by counsel, when called upon for his defence, chose to make a statement.

One of the grounds of appeal was that at the close of the defence the learned President refused to allow counsel to make his submission. Counsel for the defence sought to file with his petition of appeal an affidavit stating that after the appellant had made a statement from the dock he was not allowed by the learned President to make any submission.

Held: (1) as the statement made by the appellant was inconsistent with his innocence, he was properly convicted;

(2) appellant had no right to make any submission whatever after making a statement from the dock since he had not given evidence.

Observations on procedure when filing affidavit with petition of appeal.

Cases referred to:—

(1) *Chan Thim v. Public Prosecutor*, (1949) M.L.J. 72.

(2) *Mahindar Singh v. Public Prosecutor*, (1941) M.L.J. 230.

CRIMINAL APPEAL.

Henry Cheah for the appellant.

Mohamed Salleh bin Abas (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Smith J.: — This was an appeal against conviction. The appellant was charged with dishonestly retaining stolen property, an offence punishable under section 411 of the Penal Code.

The prosecution case was that the appellant received from the thief a box of 100 nozzles which had been stolen from Messrs. Wearne Brothers Ltd. The thief gave evidence that he gave them to the appellant and that the appellant promised to pay him $4 each for the nozzles, the list price of which was about $22 each. Evidence was given by other members of the staff of Wearne Brothers to the effect that the nozzles had been issued from store to the heavy equipment division which division was not normally authorised to sell spares. The appellant led the police inspector to a room at No. 14, Weld Road, Kuala Lumpur, and handed to him the box of nozzles. It was submitted by the appellant's counsel that these facts did not constitute a *prima facie* case in that the evidence of the thief was uncorroborated. In his grounds of judgment the learned President made no reference to his relying in any way on the evidence of the accomplice but appears to have been correctly relying on the fact that the appellant was in possession of goods which had been recently stolen. The evidence given by employees of Wearne Brothers other than the thief clearly showed that the nozzles did not leave the workshops in a normal manner and were clearly stolen goods.

The appellant, who was represented by counsel, when called upon for his defence chose to make a statement. The question is whether that statement was consistent with the appellant's innocence and as such should have been accepted even though the President was not convinced of its truth — see *Chan Thim v. Public Prosecutor.*[1] The learned President gave several reasons for not accepting the statement of the appellant. Though the facts do not strike me in quite the same way as they struck the learned President, I see no reason to disagree with him and for reasons additional to his I also regard the statement as one which does not raise in my mind a doubt concerning the appellant's guilt.

The appellant's statement was to the effect that he went to Wearne Brothers to buy a new coil filter but was unable to obtain one. He met the thief outside who handed him a packet with a receipt. The thief asked the appellant to keep the packet in his (the appellant's) house and he, the thief, would collect it later on. Later that day the police came and asked the appellant

where the nozzles were and he took them to where they were.

I agree with the learned President that the story is unconvincing since the appellant has given no explanation why he was performing this particular service. He does not tell the Court what the reason was which the thief gave for asking him to take the parcel. The thief was not a salesman. The appellant appears to have made no enquiries whatsoever as to what he was taking, or explained why he took it and why he took it straight to his own room and not back to his place of work.

A further point arose on the appeal. One of the grounds of appeal was that at the close of the defence the learned President refused to allow counsel to make his submission. Counsel sought to file with his petition of appeal an affidavit stating that after the appellant had made a statement from the dock he was not allowed by the learned President to make any submission to the Court. I consider that it is not open to the Court to consider this affidavit. The Court is bound by the record which is placed before it. If that record appears to the appellant to be lacking in any particular, I consider that the proper procedure is for the appellant or his counsel to write to the Clerk of the Court asking him to bring the alleged omission to the notice of the learned President. If the learned President agrees that what is alleged is true it will then be read with the record. If the learned President disagrees it will not be read with the record. The remedy of the appellant if he is dissatisfied may possibly lie elsewhere.

In this particular case the Court appears to have relied upon the strict wording of section 174(ii) of the Criminal Procedure Code which regulates closing addresses; it reads: "When the accused is called upon to enter on his defence, he or his advocate.....if the accused gives evidence or witnesses are examined on his behalf may sum up his case."

The case of *Mahindar Singh v. Public Prosecutor*[2] is authority for the proposition that failure to give the defence an opportunity to address the Court at the close of the case is an irregularity sufficient to justify a retrial. The report does not disclose whether or not any evidence was led for the defence.

I do not consider that a statement by an accused person from the dock is evidence in view of the provisions of section 4(1)(a) of the Oaths and Affirmations Ordinance, 1949, the essential part of which reads ".....oaths shall be taken by.....witnesses, that is to say, all persons who.....give evidence.....before any Court .....". Since the appellant was not sworn or affirmed he did not give evidence.

It would appear, therefore, that strictly speaking the appellant had no right to make any submission whatever after making a statement from the dock since he had not given evidence.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Bannon & Bailey.*

PUBLIC PROSECUTOR v. TAHIR BIN AHMAD

[A.Cr.J. (Good J.) August 21, 1958]

[Ipoh — Criminal Appeal No. 32 of 1958]

Criminal Law and Procedure — Sentence — Inadequacy of sentence for offence of extortion — Penal Code, s.383.

This was an appeal by the Public Prosecutor against the inadequacy of sentence imposed on the respondent who as a special Constable on duty at a gate check at a New Village had committed the offence of extortion from a female rubber tapper for which he was sentenced to a fine.

The Magistrate's reasoning in passing the sentence was that the respondent was in receipt of a small salary and the fact that on conviction he will be dismissed from the Police Force.

Held: (1) extortion is a most serious offence, and it would be a very alarming prospect if the smallness of income of special Constables was to be taken as an excuse for extorting money from the public;

(2) the fact that the respondent would be dismissed from the Police Force as a result of his conviction, which the Magistrate took into account, had very little bearing, if any, upon the forensic consequences of his crime.

In all the circumstances of the case, the sentence of a fine was set aside and a sentence of six months' imprisonment substituted therefore.

MAGISTRATE'S APPEAL.

Abdul Kadir bin Yusof (Federal Counsel) for the appellant.

Respondent in person.

Good J. (giving oral judgment): — This appeal does not concern the conviction of the respondent on a charge of extortion. It is an appeal by the Deputy Public Prosecutor against inadequacy of sentence. The respondent alleges that the case was what is known as a "frame-up." Since the record has come to my knowledge, I am entitled to look at it, and with a view to possible exercise of my revisionary